ZONNIE BAHE
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-49-A Decided September 23, 1991

Appeal from the denial of a grazing permit on the Hopi Partitioned Lands.

Affirmed.

1. Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Generally

A decision issued by a Bureau of Indian Affairs official cannot properly be said to be "final" when a notice of appeal was filed from that decision, but was not acted upon as required by relevant regulations.

APPEARANCES: Helen A. Tuddenham, Esq., Tuba City, Arizona, and Sherryl A. Jones, Esq., Window Rock, Arizona, for appellant; Wayne C. Nordwall, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Area Director; Tim Atkeson, Esq., Denver, Colorado, for intervenor Hopi Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Zonnie Bahe seeks review of a December 21, 1989, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (BIA; Area Director), denying her application for a grazing permit on the Hopi Partitioned Lands (HPL). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Appellant is a member of the Navajo Nation, awaiting relocation under the Navajo-Hopi Settlement Act, as amended, 25 U.S.C. §§ 640d through 640d-28 (1988) (settlement act). 1/ Appellant submitted an application for a grazing permit on the HPL on April 22, 1981. Appellant stated that she owned 7 sheep, 1 goat, 4 cows, and 1 horse. A search of BIA records

1/ All further references to the United States Code are to the 1988 edition.

revealed that appellant was not listed on the Joint Use Area Project Officer's (Project Officer) 1976-77 livestock inventory. Accordingly, by letter dated October 9, 1981, she was notified that her application was denied, and was informed of her right to appeal the denial. Using a standard appeal form developed and distributed by the Navajo Nation, appellant filed a timely notice of appeal from this determination on November 5, 1981. She filed a second notice of appeal, using the same standard form, on November 12, 1981. 2/

Appellant filed a second application for a grazing permit on October 6, 1982. This application stated that appellant had 12 sheep/goats and 7 cows. On February 25, 1983, before the second application had been considered, a third notice of appeal was filed on appellant's behalf by the Navajo-Hopi Task Force. Appellant was also covered by a blanket notice of appeal filed by the Navajo Nation in February 1983.

Appellant again applied for a grazing permit on February 25, 1983. On August 18, 1983, the Acting Assistant Phoenix Area Director returned the application to appellant, stating that her appeals of earlier denials had not yet been resolved, so that her eligibility for a grazing permit had not been determined.

On October 13, 1983, the Deputy Assistant Secretary - Indian Affairs (Operations) dismissed appellant's individual appeals for failure to file a statement of reasons or other arguments in support of the appeal. The decision letter, which was sent directly to appellant, stated that it was "based on the discretionary authority of the Assistant Secretary - Indian Affairs, and [was] final for the Department."

By letter dated November 10, 1983, appellant objected to this decision, stating that "[d]uring the period of my appeal you did not give me an opportunity to present any materials which would prove you otherwise, instead, you sent me another denial. Please be informed that I am prepared to present you documents which prove that I have always had livestock." This letter was sent to the Natural Resource Manager for the Phoenix Area Hopi Partitioned Land Office in Flagstaff, Arizona. There is no evidence in the record that any action was taken in response to appellant's letter.

2/ The standard form notice of appeal stated in its entirety:

"Pursuant to Part 2 of Title 25 of the Code of Federal Regulations, I, _____, hereby serve notice that I am appealing the decision of the Area Director of the Phoenix Area Off ice denying me a grazing permit to graze livestock on Hopi partitioned land on the grounds that the decision is arbitrary, capricious and otherwise contrary to law."

Appellant's first notice of appeal had incorrectly listed her address in the space for her name. The writing in the blank on the copy of the second notice of appeal in the administrative record is not legible. Appellant's address is, however, given under her signature in writing which differs from appellant's. Both notices of appeal were mailed to BIA and were postmarked Keams Canyon.

The appeals filed on appellant's behalf by the Navajo-Hopi Task Force and the Navajo Nation were apparently both before the Assistant Secretary - Indian Affairs on December 20, 1983, when he issued a decision in the blanket appeal filed by the Navajo Nation. The Assistant Secretary's decision indicated that a decision was pending on appellant's 1981 appeal. The decision, which was sent to the Navajo Nation Department of Justice, concluded:

> Inasmuch as the issues involved in this appeal are presently before the court in Zee v. Watt, Civ. No. 83-200 PCT-EHC [D.Ariz. Mar. 29, 1985 3/], further administrative appeal of this decision would not be in the interest of the Department or the appellants. Therefore, pursuant to the authority delegated to me at 209 DM-8, this decision is final for the Department and appellants' administrative remedies are, under the regulations at 25 CFR § 2.3, exhausted.

Appellant was issued an impoundment notice on June 15, 1984, indicating she had 6 cows in trespass on the HPL. The notice stated that the brand on the trespassing cattle was registered in appellant's name. Although the Navajo-Hopi Legal Services Program appealed this notice on appellant's behalf, the administrative record does not contain any information relating to the ultimate resolution of the matter.

Appellant again applied for a grazing permit on December 5, 1988. In this application, she stated she owned 20 sheep/goats, 10 cows, and 3 horses. By letter dated May 10, 1989, appellant's application was denied based upon the October 13, 1983, dismissal of appellant's prior appeals. Appellant filed a timely appeal from this decision. Appellant argued that the earlier decision should not be binding upon her because she had not received assistance from BIA in preparing her appeal; she grazed livestock on the HPL during 1976 and 1977, but those livestock were grazed under her father's name and brand; and she had evidence to support her assertions that she grazed livestock in the mid 1970's and that the inventory done by the Project Officer was not accurate.

The Area Director's December 21, 1989, decision, which is the basis for the present appeal, stated (1) if appellant had requested assistance from BIA, she would have been helped to fill out appeal forms, told she had to file a statement of reasons, walked through documents used in making the determination, told what documents were needed to prove BIA had erred in its determination, and referred to the legal assistance available through the Navajo Nation; (2) neither the Navajo Nation Department of Justice nor

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3/ Zee was dismissed on Mar. 29, 1985. The court stated:

"The underlying claims in this proceeding are directly related to the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d et seq. As such, individual tribal members have no standing to maintain this action. Sekaquaptewa v. MacDonald, 544 F.2d 396, 403 (9th Cir. 1979); Sidney v. MacDonald, 536 F. Supp. 420 (D. Ariz. 1982), aff'd, Sidney v. Zah, 714 F.2d 1453, 1457 (9th Cir. 1983)."

the Navajo-Hopi Task Force submitted any evidence in support of appellant's appeals; and (3) the decision declining to issue a grazing permit based upon the Department's earlier decisions and appellant's failure to show any changed circumstances was correct under the doctrine of administrative finality and res judicata. In addition, the Area Director stated:

> We have, nonetheless, examined the documents appended to [appellant's] latest appeal. The documents presented are not sufficient to support her claim for a permit to graze livestock on the HPL. The documents reveal that her father, James Salon Begay, #363, did indeed have a livestock inventory established with the Project Officer. Mr. Begay resided at 102 SW 007 in 1976 when his inventory of 39 sheep units was taken. During the inventory process Mr. Begay was asked if he was the sole owner of the livestock. Mr. Begay reported that he was not the sole owner of the livestock but was an owner-in-common with another individual. The individual Mr. Begay said owned some of the livestock was not [appellant]. Additionally, the Individual Livestock Tally and Receipts (Livestock Tallys) [appellant] used to support her petition only help to support the Phoenix Area Director's 1981 decision. The tally sheets show that Mr. Begay had livestock. However, the last or latest tally sheet is dated June 25, 1980. The tally sheets for [appellant] do not start until June 18, 1981, four years after the Project Officer's inventory and two months after [appellant's] original application. Those facts aside, had [appellant] been inadvertently missed during the Project Officer's inventory or had she been an owner-in-common in her father's herd, she still would have been denied a permit to graze livestock on the HPL. [Appellant's] father James Salon Begay, resides on Navajo Partitioned Land (NPL) and she would, therefore, have to graze her livestock on the NPL and not the HPL as she desires.

(Decision at 6).

The Board received appellant's notice of appeal from this decision on February 1, 1990. Briefs were filed by appellant, the Area Director, and the Hopi Tribe as intervenor.

Standing

The Area Director first argues that, except for suits involving eligibility for relocation benefits, actions arising under the settlement act may be brought only by the Chairmen of the Navajo Nation and the Hopi Tribe, acting on behalf of their tribes and the individual members. Accordingly, the Area Director contends that appellant lacks standing to bring this appeal as an individual. In support of this position, the Area Director cites Benally v. Hodel, 913 F.2d 1464 (9th Cir. 1990); Bedoni v. Navajo-Hopi Relocation Commission, 878 F.2d 1119 (9th Cir. 1989); Walker v. Navajo-Hopi Indian Relocation Commission, 728 F.2d 1276 (9th Cir.), cert. denied, 469 U.S. 918 (1984); and Zee, supra. See also 25 U.S.C. § 640d-7.

The cases cited by the Area Director indicate that suits challenging the implementation of the settlement act must be brought by the tribal chairmen. As noted supra at note 3, the court in Zee dismissed for lack of standing individual challenges to the implementation of the interim grazing regulations. In distinction, Walker holds that an individual can maintain suit to challenge the amount of relocation benefits to which he or she is entitled.

The prior history of this matter suggests that the Navajo Nation believed it was responsible for bringing administrative appeals on behalf of its tribal members over grazing issues. In 1983, the Navajo Nation filed such appeals on behalf of 687 tribal members, including appellant, whose grazing permits were denied or restricted. This was treated as an appropriate appeal by the Assistant Secretary.

Appellant argues that the present appeal is specifically authorized under 43 CFR 4.331, 4/ and that it is more closely related to the specific, personal interests at stake in Walker than to the more general challenges to the settlement act, the regulations, and their implementation addressed in the other cases cited by the Area Director.

The Area Director did not question appellant's standing when he issued his 1989 decision. Furthermore, 25 CFR 168.18 provides that appeals under 25 CFR Part 168 may be taken through the procedures in 25 CFR Part 2, which culminates with an appeal to the Board. Although it appears at least possible that appellant would be found to lack standing in Federal court, under the circumstances of this case the Board declines to hold that she lacks standing for the purposes of this administrative appeal.

Discussion and Conclusions

Appellant's initial argument is that she has never received a decision in her appeal from the Deputy Assistant Secretary's October 13, 1983, dismissal of her original appeals, and that, therefore, there is no administrative finality to that decision.

As noted above, appellant's notice of appeal from the Deputy Assistant Secretary's decision was sent to the Flagstaff BIA office. 25 CFR 2.13(b) (1983) provided: "Bureau of Indian Affairs offices receiving a misdirected

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4/ Section 4.331 provides:

"Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under the regulations in Title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except--

"(a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official;

"(b) Where the decision has been approved in writing by the Secretary or Assistant Secretary - Indian Affairs prior to promulgation; or

"(c) Where otherwise provided by law or regulation."

appeal document shall forward the document to the proper office promptly." In 1983 an appeal from a decision of the Deputy Assistant Secretary should have been taken to this Board. 43 CFR 4.331 and 4.332 (1983). Even though the Deputy Assistant Secretary's decision stated that it was final for the Department because it was based upon the exercise of discretion, prior to the Deputy Assistant Secretary's decision in this case, the Board had held that the determination of whether or not a decision is properly characterized as discretionary is a legal determination, subject to Board review. Billings American Indian Council v. Deputy Assistant Secretary - Indian Affairs (Operations), 11 IBIA 142 (1983); Aleutian/Pribilof Islands Association, Inc. v. Acting Deputy Assistant Secretary - Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982). Accordingly, appellant's 1983 notice of appeal should have been forwarded to this Board.

[1] Because of the failure to respond to and properly handle appellant's notice of appeal, the Deputy Assistant Secretary's decision cannot properly be termed "final." Tsosie v. Navajo Area Director, 20 IBIA 108, 114-15 (1991). As discussed in Tsosie, because the appeal process begun in 1983 was never completed, the Board could remand this matter to BIA for a new decision on appellant's eligibility for a grazing permit. Based upon a thorough review of the administrative record and the Area Director's 1989 decision, however, the Board has determined that such a procedure would only result in further unnecessary delays. The Area Director considered appellant's case on the merits in his 1989 decision. The Board will review that decision. 5/

The issue raised by this appeal is whether the Area Director properly determined that appellant was ineligible for a grazing permit because she did not "ha[ve] a livestock inventory listed with the Project Officer," as is required by 25 CFR 168.1(o)(2). "Livestock inventory" is defined at 25 CFR 168.1(r) to mean "the original list as amended (developed by the Project Officer in 1976-77) of livestock owned by persons having customary grazing use in the former Joint Use Area."

Appellant admits that she is not listed on the Project Officer's 1976-77 list. This admission would appear to be sufficient for a finding that appellant is not eligible for a grazing permit under 25 CFR 168.1(o) (2), which requires that a person have such a livestock inventory. The Board will, however, consider appellant's arguments as to why her failure to have a livestock inventory should not disqualify her from receiving a grazing permit.

Appellant alleges that she has been grazing livestock on the HPL since before 1975, but that her livestock, which was given to her orally by her father, was grazed under her father's permit and brand. She thus argues that her livestock was listed in the inventory, but under her father's

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5/ Because of this disposition, the Board does not reach appellant's arguments relating to the merits of the Deputy Assistant Secretary's 1983 dismissal of her appeal.

name. Appellant asserts that the primary purpose served by the livestock inventory was to count the total number of livestock grazing in the joint use lands, in order to effectuate the reduction mandated by the settlement act, and she should not be prohibited from grazing her livestock even though they were not listed under her name on the inventory.

25 U.S.C. § 640d-13(a) provides: "No individual shall hereafter be allowed to increase the number of livestock he grazes on any area partitioned pursuant to this subchapter to the tribe of which he is not a member, nor shall he retain any grazing rights in any such area subsequent to his relocation therefrom." 6/ Both this section and the implementing regulations in 25 CFR Part 168 are clearly addressed to individuals. Grazing rights in the HPL are individual rights and each individual must be able to prove that he or she was grazing livestock in 1976-77. In addition, each individual must be able to prove the number of livestock being grazed at that time.

Appellant stated in her April 22, 1981, application for a grazing permit that she grazed 7 sheep, 1 goat, 4 cows, and 1 horse. 7/ Appellant's father's livestock inventory, which was the basis for determining the number of livestock he could graze, stated that he had 7 sheep (plus 7 lambs), 8 goats (plus 9 kids), no cows or calves, and 4 horses (plus 4 colts). In support of her arguments, appellant submitted a copy of permit No. 7-574, issued to her father on August 27, 1958, and Individual Livestock Tally and Receipts sheets for various dates in 1976, 1977, 1979, 1980, and 1981. The tally sheets for 1976, 1977, 1979, and 1980 are made out in the name of appellant's father, 8/ while those for 1981 are made out in appellant's name; all of the sheets show appellant's census number; those sheets which show a permit number show appellant's father's number. The sheets show varying, but low, numbers of sheep, goats, cows, and horses. Appellant also submitted a March 6, 1983, affidavit from Marian Begay to the effect that on June 15, 1975, she witnessed appellant's father convey his grazing permit No. 7-574, his brand, and grazing privileges to his son, Bennie H. James, and appellant.

6/ In addition, 25 U.S.C. § 640d-18 provides for an overall reduction of livestock for range conservation purposes.

7/ As noted supra, appellant's 1982 application indicated she had 12 sheep/goats and 7 cows, and her 1988 application indicated she had 20 sheep/goats, 10 cows, and 3 horses. The 1984 trespass notice sent to appellant stated that 6 cows had been found to be in trespass. In addition, in a declaration submitted in support of her 1989 appeal, appellant stated that in 1976-77 she owned 20 sheep, 7 cows, and 2 horses.

8/ Appellant's father died on Oct. 21, 1978. At page 3 of her opening brief, appellant states that her father orally conveyed livestock to her in 1975 when he was 98. A computer printout of appellant's father's 1976-77 livestock inventory shows his date of birth as June 15, 1877. However, both a nursing home summary form, apparently completed upon appellant's father's admission to the home, and his death certificate show his birth date as June 15, 1897.

The documents appellant has submitted are not sufficient to prove that she owned livestock in 1976-77. Despite the assertion that appellant's father conveyed livestock to appellant and her brother in 1975, the Project Officer's inventory shows that appellant's father claimed the livestock in 1976-77. The number of livestock appellant states she grazed in 1976-77 generally exceed the number listed on her father's inventory, although she alleges that her livestock was shown on his inventory. The information on the tally sheets is too inaccurate to prove ownership of the livestock listed on the sheets, and does not show where the livestock were grazed. Although appellant's father's brand is now apparently registered with BIA in appellant's name, appellant has presented no evidence as to when and how the brand registration was changed to her name. Furthermore, the mere fact of registration of a brand in appellant's name does not prove that appellant owned livestock. Because of these and other problems with the evidence appellant has presented, she has failed to prove that the livestock listed on the Project Officer's inventory under her father's name actually belonged to her. 9/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 21, 1989, decision of the Phoenix Area Director is affirmed.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge

9/ The Board does not address the question of whether any grazing rights appellant might have had based upon those of her father would have been on Navajo Partitioned Lands rather than on the HPL. The documents in the administrative record are not sufficient to allow such a determination.